

**CALIFORNIA LAW REVISION COMMISSION**

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October 15, 1993

<i>Date:</i> October 28-29, 1993	<i>Place:</i> Sacramento
October 28 (Thursday) 10:00 am – 5:00 pm October 29 (Friday) 9:00 am – 4:00 pm	State Capitol Room 3191
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.	

**FINAL AGENDA***for meeting of the***CALIFORNIA LAW REVISION COMMISSION****October 28-29, 1993**

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1. MINUTES OF SEPTEMBER 23-24, 1993, MEETING (to be sent)
  2. ADMINISTRATIVE MATTERS
    - 1994-95 Budget**  
Report by Executive Secretary
    - Communications from Interested Persons**
  3. LEGISLATIVE PROGRAM
    - Final Report on 1993 Legislative Program**  
Memorandum 93-48 (NS) (to be sent)
  4. ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS  
(Study J-801)
    - Revised Draft of Recommendation**  
Memorandum 93-52 (RJM) (to be sent)

## 5. TRIAL COURT UNIFICATION (Study J-1000)

- (1) **Introduction — SCA 3**  
Memorandum 93-53 (NS) (sent 9/30/93)  
First Supplement to Memorandum 93-53 (to be sent)
- (2) **Judicial Council Report**  
Memorandum 93-54 (NS) (sent 10/5/93)
- (3) **General Issues (Study J-1010)**  
Memorandum 93-55 (NS) (sent 10/5/93)  
First Supplement to Memorandum 93-55 (to be sent)
- (4) **Article 6, Section 1. Judicial Power (Study J-1020)**  
Memorandum 93-56 (NS) (sent 10/7/93)
- (5) **Article 6, Section 4. District Court (Study J-1030)**  
Memorandum 93-57 (NS) (to be sent)
- (6) **Article 6, Section 6. Judicial Council (Study J-1040)**  
Memorandum 93-58 (RJM) (enclosed)
- (7) **Article 6, Section 10. Original Jurisdiction (Study J-1050)**  
Memorandum 93-59 (NS) (sent 10/12/93)
- (8) **Article 6, Section 11. Appellate Jurisdiction (Study J-1060)**  
Memorandum 93-60 (NS) (sent 10/12/93)  
First Supplement to Memorandum 93-60 (to be sent)
- (9) **Article 6, Section 15. Qualifications of Judges (Study J-1070)**  
Memorandum 93-61 (BSG) (sent 10/12/93)
- (10) **Article 6, Section 16. Election of Judges (Study J-1080)**  
Memorandum 93-62 (NS) (sent 10/14/93)
- (11) **Article 6, Section 16.5. Transitional Provisions (Study J-1090)**  
Memorandum 93-63 (NS) (to be sent)
- (12) **Article 6, Section 19. Compensation of Judges (Study J-1100)**  
Memorandum 93-64 (RJM) (to be sent)
- (13) **Article 6, Section 20. Retirement (Study J-1110)**  
Memorandum 93-65 (RJM) (to be sent)
- (14) **Article 6, Section 22. Commissioners (Study J-1120)**  
Memorandum 93-66 (NS) (to be sent)

**(15) Article 1, Section 16. Trial by Jury (Study J-1130)**  
Memorandum 93-67 (RJM) (sent 10/7/93)

**(16) Miscellaneous Provisions (Study J-1140)**  
Memorandum 93-68 (NS) (to be sent)

CALIFORNIA LAW REVISION COMMISSION  
MEETING SCHEDULE

*Scheduled*

<b>October 1993</b>	<b>Sacramento</b>
Oct. 28 (Thur.)	10:00 am – 5:00 pm
Oct. 29 (Fri.)	9:00 am – 4:00 pm
<b>November 1993</b>	<b>Los Angeles</b>
Nov. 18 (Thur.)	10:00 am – 6:00 pm
Nov. 19 (Fri.)	9:00 am – 4:00 pm
<b>December 1993</b>	<b>Sacramento</b>
Dec. 9 (Thur.)	10:00 am – 5:00 pm
Dec. 10 (Fri.)	9:00 am – 4:00 pm
<b>January 1994</b>	<b>San Francisco</b>
Jan. 20 (Thur.)	10:00 am – 6:00 pm
Jan. 21 (Fri.)	9:00 am – 4:00 pm

*Tentative*

<b>March 1994</b>	<b>Sacramento</b>
March 24 (Thur.)	10:00 am – 5:00 pm
March 25 (Fri.)	9:00 am – 4:00 pm
<b>May 1994</b>	<b>Sacramento</b>
May 12 (Thur.)	10:00 am – 5:00 pm
May 13 (Fri.)	9:00 am – 4:00 pm
<b>July 1994</b>	<b>Los Angeles</b>
July 14 (Thur.)	10:00 am – 6:00 pm
July 15 (Fri.)	9:00 am – 4:00 pm
<b>September 1994</b>	<b>Sacramento</b>
Sep. 22 (Thur.)	10:00 am – 5:00 pm
Sep. 23 (Fri.)	9:00 am – 4:00 pm
<b>November 1994</b>	<b>Los Angeles</b>
Nov. 10 (Thur.)	10:00 am – 6:00 pm
Nov. 11 (Fri.)	9:00 am – 4:00 pm

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**MINUTES OF MEETING**  
**CALIFORNIA LAW REVISION COMMISSION**  
**OCTOBER 28-29, 1993**  
**SACRAMENTO**

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A meeting of the California Law Revision Commission was held in Sacramento on October 28-29, 1993.

**Commission:**

*Present:* Sanford Skaggs, Chairperson  
Daniel M. Kolkey, Vice Chairperson  
Arthur K. Marshall  
Edwin K. Marzec  
Forrest A. Plant  
Colin Wied (Oct. 28)

*Absent:* Christine W.S. Byrd  
Terry B. Friedman, Assembly Member  
Bion M. Gregory, Legislative Counsel  
Bill Lockyer, Senate Member

**Staff:**

Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara Gaal, Staff Counsel  
Robert J. Murphy, Staff Counsel (Oct. 28)

**Consultants:**

None

**Other Persons:**

Steve Birdlebough, Judicial Council of California, Sacramento  
Coleman A. Blease, Third District Court of Appeal, Sacramento (Oct. 29)  
Clark Kelso, McGeorge Law School, Sacramento  
David Long, State Bar Estate Planning, Trust and Probate Law Section, San Francisco  
Michael Rothschild, California Attorneys for Criminal Justice, Sacramento (Oct. 28)  
Greg Schmidt, Senate Judiciary Committee (Oct. 28)  
Jon D. Smock, California Defense Counsel, Sacramento (Oct. 28)  
Marcia Taylor, Judicial Council of California, Sacramento  
Roger K. Warren, Judicial Council of California, Sacramento

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MINUTES OF SEPTEMBER 23-24, 1993, COMMISSION MEETING

The Commission approved the Minutes of the September 23-24, 1993, Commission meeting, with the following change:

On page 4, the first sentence of the second paragraph under the heading **New Topics and Priorities** was revised to read: “The Executive Secretary also reported

that a press release was issued September 21 to try to build up a mailing list that includes judges and other persons.”

#### ADMINISTRATIVE MATTERS

##### **1994-95 Budget**

The Executive Secretary reported that the Governor’s budget is in the process of being prepared for submission to the Legislature. The 1994-1995 budget allocated for the Commission is the same as the current budget: a total of approximately \$400,000 (roughly \$100,000 for operating expenses and \$300,000 for personnel). The Commission will have to continue its current austerity program, including reduced operations and reduced productivity under this budget. The trial court unification study will strain the Commission’s resources. The staff has written to Senator Lockyer’s office about this but has not yet received a response.

#### LEGISLATIVE PROGRAM

##### **1993 Legislative Program**

The Commission considered Memorandum 93-48 and its First Supplement, relating to the Commission’s 1993 legislative program. The Commission approved the reports on the legislative program set out in the Exhibit to the First Supplement. The Executive Secretary reported that all of the Commission’s 1993 bills were enacted.

The Commission approved the revised Comment to Probate Code Section 6451, set out in the First Supplement. That Comment states that the statute changes the rule of *In re Estate of Reedy*, 22 Cal. Rptr. 2d 478 (1993), a recent case that may still be overturned or depublished. The Comment should indicate that a request for further hearing is pending. If necessary, the Comment can later be changed to reflect further developments in the *Reedy* case.

##### **1994 Legislative Program.**

The Executive Secretary reported that the 1994 legislative program is limited because the trial court unification study will require most of the Commission’s resources. The 1994 legislative program will include, in addition to any proposals on trial court unification, proposed legislation on powers of attorney, effect of

joint tenancy title on marital property, and orders to show cause and temporary restraining orders.

#### STUDY J-801—ORDERS TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDERS

The staff reported that the Committee on Administration of Justice requires additional time to review the draft recommendation. This matter will therefore be on the December, rather than November, agenda.

#### STUDY J-1000—TRIAL COURT UNIFICATION

##### **Introduction—SCA 3**

The Commission began its deliberations on trial court unification under SCA 3 with consideration of Memorandum 93-53 and its First Supplement. The Executive Secretary noted that there is strong support for trial court unification in the Legislature.

The Executive Secretary described the interim hearing on SCA 3 in San Diego in October. The staff will distribute the hearing transcript to the Commissioners when it is available. The Executive Secretary reported the hearing revealed that (1) there is tension between the legislative branch and the judicial branch regarding how SCA 3 should allocate power among those branches, (2) there are differences of opinion regarding the proper level of detail to incorporate into SCA 3, and (3) there is tension within the judiciary regarding how much power should be centralized rather than left with the individual courts.

The Executive Secretary noted that the Commission's task is not to decide whether unification is warranted, but rather to report to the Legislature on how to accomplish unification. The Executive Secretary cautioned against wasting time evaluating the pros and cons of unification.

The Commission asked the staff to prepare a table to help the Commission in considering SCA 3. The table is to summarize for each of the major issues (1) existing law, (2) the approach of SCA 3, (3) the 1993 Judicial Council Report, (4) the staff recommendation, and (5) Commission action.

The Commission's tentative schedule for its study of SCA 3 is as follows:

**10/28/93-10/29/93:** At this meeting, the Commission will make preliminary decisions on issues raised by trial court unification. The staff will thereafter incorporate those preliminary decisions into a staff draft of a tentative recommendation.

**11/18/93-11/19/93:** The Commission will review the staff draft tentative recommendation. Following this meeting, the staff will revise the tentative recommendation to incorporate the Commission decisions, and then circulate a tentative recommendation to the mailing list.

**12/9/93-12/10/93:** The Commission will consider comments on the tentative recommendation and decide whether to make further changes. The staff will then prepare a draft of a final recommendation to the Legislature on the structure of the constitutional amendment.

**1/20/93-1/21/93:** The Commission will review the staff draft of the final recommendation and make any necessary revisions before submitting the report to the Legislature. After this meeting, the staff will finalize the Commission's recommendation for submission to the Legislature.

**2/1/93:** Recommendation due to the Legislature on the structure of the constitutional amendment.

### **1993 Judicial Council Report**

Memorandum 93-54 includes the 1993 Judicial Council Report on trial court unification. The Executive Secretary urged the Commissioners to read the report if they have not already done so.

#### **STUDY J-1010—TRIAL COURT UNIFICATION: GENERAL ISSUES**

The Commission considered Memorandum 93-55 and its First Supplement, relating to general issues involving trial court unification. These materials require no Commission action, but provide background on the context of the Commission's study. To the extent the Commission can eliminate or defuse arguments against unification as part of its recommendations on SCA 3, the Executive Secretary suggested it should do so.

Representatives of the Judicial Council informed the Commission that the National Center for State Courts is studying the fiscal implications of trial court unification. The results are expected in January. A second study for the Judicial Council focuses on the specifics of how to achieve unification; this study is being prepared by the Judicial Management Institute and is due February 1.

The Executive Secretary noted that the last trial court unification proposal was soundly defeated at the polls due to fiscal concerns. He suggested that in making its recommendation on SCA 3, the Commission should attempt to alleviate such concerns where possible.

#### STUDY J-1020—TRIAL COURT UNIFICATION: JUDICIAL POWER

The Commission considered Memorandum 93-56, relating to judicial power (Cal. Const. Art. VI, § 1). SCA 3 would unify the current municipal, justice, and superior courts into a single class of trial-level courts.

The Commission considered whether “district court” (the name used in SCA 3) would be the best name for the unified courts. The Commission concluded that the name “superior court” would be preferable because (1) it would be less confusing (“district court” might be construed as a reference to a federal district court or district court of appeal), (2) it would save the expense of incorporating a new name into numerous forms, statutes, stationery, nameplates, and the like, and (3) it may set the right tone for unification by conveying an aura of improving the general quality of justice. The Commission also considered the name “county court,” but rejected it due to its implications regarding the degree of county versus state control, as well as the possibility that there may be trial courts serving more than one county or only part of a county.

#### STUDY J-1030—TRIAL COURT UNIFICATION: DISTRICT COURT

The Commission considered Memorandum 93-57, relating to organization of the unified court (Cal. Const. Art. VI, § 4).

##### **Use of County Lines**

The Commission discussed whether the unified trial courts should be organized along county lines. The Executive Secretary pointed out that the Judicial Council Report sets forth persuasive reasons for using county lines—(1) since 1879, county lines have been the boundary for California’s trial courts with general jurisdiction, (2) county lines are a familiar governmental unit, (3) superior court administrative structures are based on county lines, (4) public agencies that interact with trial courts, such as prosecutors, public defenders, and law enforcement agencies, are organized on county bases, and (5) counties continue to provide some of the funding for trial courts (although the trend is towards increased state financing). It was noted that the use of county lines may have implications under the Voting Rights Act. See the discussion below under Study J-1080 (election of judges).

### **Control Over Geographical Division of Courts**

The Commission discussed at length whether, as proposed in SCA 3, the Constitution should specify that the Legislature may divide the trial courts into branches. The staff's recommendation was to state in the Constitution that "[t]he Legislature shall provide for the organization of district courts." Unlike SCA 3 as presently drafted, the staff's recommended language would allow the Legislature to delegate its authority over the establishment of branches. The staff further proposed recommending to the Legislature that it exercise this power to delegate authority.

The Commission rejected use of the phrase "organization of district courts". The phrase is overly broad and ambiguous, and might be construed to give the Legislature absolute control over the courts, raising serious separation of powers problems.

The Executive Secretary explained that the Legislature currently controls where municipal and justice courts sit, but the Constitution is silent regarding superior courts. Greg Schmidt (consultant to the Senate Judiciary Committee) commented that as a political matter, eliminating the Legislature's authority over the creation of branches may be problematic. Representatives of the Judicial Council stated that the judiciary should have control over the creation of branches, without legislative oversight.

After hearing and analyzing these views, the Commission tentatively agreed that the court ought to have control over where it sits, subject to funding limitations. The Commission reasoned in part that interplay between courts and their funding sources is healthy and should continue.

Recognizing that such a recommendation might not be popular with the Legislature, the Commission asked the staff to prepare an alternative recommendation for Commission consideration. The alternative recommendation would be similar to the staff's original recommendation (allowing the Legislature to delegate its authority over court locations), but would avoid the broad language giving the Legislature authority to provide for "organization of district courts."

### **Economic Litigation Procedures**

The Commission discussed how to ensure that economic litigation procedures remain applicable to appropriate cases following enactment of SCA 3. The staff proposed a stopgap statutory measure to preserve the economic litigation

procedures in the event that specific statutes are not enacted before the operative date of SCA 3. The Commission adopted such a provision, along the following lines:

The following provisions shall remain applicable to causes in the district courts of a type that would be within the jurisdiction of the municipal and justice courts as it existed on June 30, 1995:

(1) The economic litigation procedures provided by Article 2 (commencing with Section 90) of Chapter 5 of Title 1 of Part 1 of the Code of Civil Procedure.

(2) Any other provision relating to the municipal and justice courts that the district court determines is necessary because application of the provision applicable to superior courts would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons.

**Comment.** This provision recognizes the necessity that some rules applicable to municipal and justice courts continue to apply to causes formerly within the jurisdiction of those courts.

Paragraph (1) preserves the Economic Litigation procedures.

Paragraph (2) is drawn from transitional provisions in Probate Code Section 3 and Family Code Section 4.

### **Court Clerk**

The Commission adopted the staff recommendation to delete the constitutional provision making the court clerk the clerk of the superior court. By statute the clerk of the unified court should be the county clerk unless the court appoints another person as clerk.

### **Court Employees**

The Commission adopted the staff recommendation that personnel matters within the unified court should be subject to control of the court. The Legislature should not be required to adopt statutes specifying the numbers, classification, and compensation of each court employee.

### **Transitional Personnel Issues**

The staff proposed establishment of a committee for resolving transitional personnel issues in trial court unification. A committee would be in place immediately on voter approval of SCA 3, so that the committee could begin to act immediately and decide the personnel issues in advance of the operative date of SCA 3.

Representatives of the Judicial Council cautioned that determining the composition of such a committee would be highly controversial and might interfere with adoption of SCA 3. They suggested leaving the issue for a later date because it is not of constitutional dimension.

The Commission felt the issue should be addressed now, in order to promote a smooth transition to the unified court. In addition, the Judicial Council should be directed, immediately upon passage of SCA 3, to address matters that have statewide import.

The Commission decided to seek suggestions on the appropriate mechanism for resolving personnel issues. To promote discussion, the tentative recommendation might include proposed statutory language along the following lines:

In each county, immediately upon passage of SCA 3 a committee shall be established to address the procedural issues of court unification. The committee shall meet and begin its work forthwith. The committee shall consist of the presiding judge of the superior court, the presiding judge of the municipal court district, and one other judge (or two other judges, if necessary to make an odd number on the committee) drawn by lot, unless the judges of the unified court by two-thirds vote decide otherwise.

The staff was directed to consult with Steve Birdlebough of the Judicial Council and make a proposal for Commission consideration at the November meeting.

Mr. Birdlebough indicated that the Constitution precludes creation, abolishment, or changing the duties of offices by urgency legislation. He suggested this might make it necessary to move the operative date of SCA 3 from July 1, 1995 to July 1, 1996. The Commission instructed the staff to research this point.

#### STUDY J-1040—TRIAL COURT UNIFICATION: JUDICIAL COUNCIL

The Commission considered Memorandum 93-58, relating to the Judicial Council (Cal. Const. Art. VI, § 6).

#### **Composition, Terms of Office, and Powers of Judicial Council**

The 1993 Judicial Council Report suggests a number of constitutional revisions regarding the composition, terms of office, and powers of the Judicial

Council. The staff recommended against making such changes, so as to avoid going beyond the Commission's assigned role and complicating the ballot issues regarding SCA 3. The Commission adopted the staff's recommendation on this point.

### **Grandparenting the Present Jurisdiction of Sitting Judges**

A number of persons have proposed that present superior court judges be given an option to hear only cases within their existing jurisdictions for the duration of their terms following the operative date of SCA 3. The 1993 Judicial Council Report proposes that any provision along these lines should be by rule and not by a constitutional provision. The Commission agreed with the Judicial Council position that incorporating such protection into the Constitution would be inappropriate.

#### STUDY J-1060—TRIAL COURT UNIFICATION: APPELLATE JURISDICTION

The Commission considered Memorandum 93-60 and its First Supplement, along with a letter from the California Attorneys for Criminal Justice' Subcommittee on SCA 3 (Exhibit pp. 1-4), relating to appellate jurisdiction (Cal. Const. Art. VI, § 11).

### **Introduction**

Trial court unification necessarily will require resolution of how to handle matters that currently are appealed from municipal and justice courts to superior courts. Unification also raises issues regarding small claims cases, which are now heard in the inferior courts but can be tried *de novo* in superior court. Additionally, certain pretrial motions in criminal cases are initially decided in the lower courts, but are subject to challenge in the superior courts.

The Executive Secretary outlined a number of proposals for affording review once the trial courts are unified:

(1) Create an appellate division within the unified trial court to review specified decisions of the trial court.

(2) Create an upper division (equivalent to the current superior court) and a lower division (equivalent to the current municipal and justice courts) within the unified trial court, with the upper division reviewing lower division decisions.

(3) Use trial court judges from nearby counties, rather than the same county, to review certain types of trial court decisions.

(4) Make all matters appealable to the Courts of Appeal, but take steps to minimize the resultant burden (e.g., eliminating the requirement of written opinions).

(5) Eliminate appeals in certain cases (e.g., traffic infractions).

(6) Provide a rehearing process, rather than an appeal process, within the unified trial court.

Mr. Birdlebough informed the Commission that if one sets aside small claims matters and minor traffic infractions, the number of judge years involved in handling appeals from the municipal and justice courts is only twelve. There are approximately 6,000 such cases per year. Mr. Birdlebough said that he was not advocating sending these matters to the Courts of Appeal, but merely providing the statistics to give the Commission perspective on the workload involved.

Professor Clark Kelso suggested that the reason the term “appeal” is currently used to refer to trials *de novo* in small claims cases may be so they will not be construed to fall within the jurisdiction of the Courts of Appeal. He cautioned that any drafting should be sensitive to this point.

### **Appellate Jurisdiction in Courts of Appeal**

The Commission discussed the idea of having the Courts of Appeal hear the cases now appealed to the superior courts. That approach would avoid the problem of having judges review decisions of their peers. But the Courts of Appeal already have a heavy caseload, and judges of those courts are reluctant to hear the types of cases now being appealed to the superior courts. Additionally, the formalities, delay, and expense of obtaining review in a Court of Appeal may be unduly burdensome in such cases. Eliminating the requirement of written opinions may not save the Court of Appeal much time.

### **Upper and Lower Divisions within Trial Court**

Justice Coleman Blease, speaking for seven of the eight justices of the Third District Court of Appeal, strongly advocated the concept of dividing the unified trial court into two divisions, one with jurisdiction similar to that of the current superior court, and the other with jurisdiction similar to that of the current municipal court. The Legislature would define the jurisdiction of the divisions. He argued that this approach would solve all of the problems of unification, except to some extent the peer review issue.

The Commission raised questions about cross-assignment of judges under such an approach, and about whether dividing the trial court into two divisions would be meaningful if cross-assignment could freely occur. Justice Blease indicated that the two divisions proposal, as advanced by his court, would not preclude cross-assignments.

Judge Roger Warren informed the Commission that the Judicial Council agrees that there should continue to be an appellate capacity within the trial courts. However, the Council disagrees on the matter of establishing two divisions within the unified trial court. Establishing such divisions would be contrary to the whole point of trial court unification, eviscerating the jurisdictional differences between the superior courts and the so-called “lower” courts.

### **Appellate Division in Unified Court**

The Judicial Council proposes an appellate division within the trial court. Judges would be appointed to that division by the Chief Justice for two or three years and there would be standards for ensuring the independence of such judges (*e.g.*, they should be highly experienced judges who have not recently served on the kinds of cases that typically come before the appellate division).

The Executive Secretary observed that the Judicial Council had not recommended creating the appellate division in the Constitution. He asked Judge Warren whether establishing the appellate division in the Constitution might help give the division the proper aura of independence. Judge Warren agreed with this. He stated that the reason the Judicial Council did not put an appellate division into the Constitution was simply because the existing appellate division is not in the Constitution.

The Commission discussed the problem of specifying which cases would be appealable to the appellate division, and which would be appealable to the Court of Appeal. On this point, the Judicial Council would divide cases into two categories, which would be treated differently not only for purposes of appellate review, but also with regard to jury size and application of various procedures (such as economic litigation procedures). In this manner, the Judicial Council seeks to preclude undue manipulation of appellate jurisdiction. In its view, allowing the Legislature to specify which cases are subject to which type of review, without linking such a decision to other consequences, would be dangerous.

The Commission discussed the possibility of creating a strong distinction between judges in the appellate division and other judges of the trial court; the appellate division could even be a training ground for serving as a Court of Appeal justice. Sharply distinguishing between the appellate division and the rest of the trial court may interfere, however, with achieving the administrative flexibility that is the primary goal of trial court unification.

The Commission also discussed the possibility that certain cases would be initially appealable to the appellate division, but be further appealable as a matter of right to the Court of Appeal. This would allow litigants to obtain Court of Appeal review if they believe their cause warrants such review, even though the case may involve only a small amount of money. However, economically powerful litigants could abuse the system at the expense of opponents with lesser resources. This concern could be alleviated to some extent by making Court of Appeal review discretionary, rather than mandatory. But even discretionary review would be an increased and unwelcome burden on the Courts of Appeal. The Courts of Appeal are already overburdened, with each justice having to generate approximately one-and-a-half opinions per day.

### **Categorization of Cases**

The Commission discussed three different proposals concerning who should decide which cases belong in which category for purposes of appeals to the appellate division of the trial court—(1) letting the Legislature decide, (2) letting the Judicial Council decide, subject to approval of the California Supreme Court, and (3) requiring the Legislature and the Judicial Council to jointly decide which cases go in which category (either by requiring Judicial Council approval of statutes on the subject, or by requiring legislative approval of relevant Judicial Council rules). The last of these proposals is based on the view that both the Legislature and the judiciary have a strong interest in deciding how cases are classified.

### **Commission Decisions**

After discussion of the foregoing matters, the Commission made the following decisions:

(1) An appellate division should be created within the unified trial court. This should be done in the Constitution. Provision should be made to preserve the independence of the appellate division and its judges, perhaps by requiring the

Judicial Council to adopt rules that will foster this. The staff was directed to gather information concerning how judges of the superior court appellate department are currently selected and to propose specific language concerning how standards for independence are to be set.

(2) As an interim statutory or constitutional measure, the jurisdiction of the appellate division should consist of appeals from what are now municipal and justice court cases.

(3) The Constitution should provide that the appellate division has jurisdiction over appeals in misdemeanor cases and civil cases prescribed by statute or by court rule not inconsistent with statute.

(4) The appellate division and its judges should be authorized to issue writs to other judges in the unified trial court. This avoids having to increase the writ jurisdiction of the Courts of Appeal.

(5) The Commission discussed, but did not resolve, whether the Legislature should be able to eliminate appeals in some causes. Professor Kelso suggested this might be viewed as a substantial change in existing law. He construes the current Constitution to afford a right of appeal in all cases that are within the original jurisdiction of the superior courts.

### **Motions Under Penal Code Sections 995 and 1538.5**

Michael Rothschild appeared on behalf of the California Attorneys for Criminal Justice. At the Commission's request, he described the current procedures for motions under Penal Code Sections 995 and 1538.5. Under Penal Code Section 995, superior courts review transcripts of preliminary hearings and assess the propriety of lower court decisions regarding whether there is sufficient evidence to hold a defendant to answer. A motion under Penal Code Section 1538.5 is a motion to exclude evidence based on unlawful police conduct in a search and seizure.

Mr. Rothschild expressed concern that SCA 3 as presently drafted does not clarify whether and how these criminal procedures will be preserved following trial court unification. He stated that the procedures are important, not only as a substantive matter but also because they promote negotiation and settlement of criminal cases.

On behalf of the Presiding Judges and Court Administrators Committees of the Judicial Council, Judge Warren stated that their support of trial court unification assumed there would be no changes in litigants' substantive rights,

only in matters of court administration. To his knowledge, all of the supporters of trial court unification intend it to be solely a measure affecting court administration, not a means of depriving litigants of any existing rights. Judge Warren suggested that perhaps SCA 3 should be amended to make that intent more clear. He further indicated it would not be a problem, based on his experience with the Superior and Municipal Courts of Sacramento County, to have judges review decisions by their peers in the context of the Penal Code review procedures.

As a guiding principle, the Commission adopted the position that SCA 3 should not impair rights of litigants, and that the existing review procedures should be preserved. Thus, any matter within the original jurisdiction of the municipal and justice courts reviewable in the superior court would, on unification of the courts, be reviewable in the appellate division of the unified court. In cases where review by a single judge rather than an en banc review panel is contemplated, the single judge would be a judge sitting in the appellate division.

Mr. Rothschild indicated that such an approach would meet some of his group's concerns, but it should not require sending a criminal appeal to a judge unfamiliar with a case, rather than a judge who has already made numerous decisions in the case.

#### STUDY J-1070—TRIAL COURT UNIFICATION: QUALIFICATIONS OF JUDGES

The Commission considered Memorandum 93-61, relating to qualifications of judges (Cal. Const. Art. VI, § 15).

#### **Ten Years versus Five Years Experience**

The staff recommended that persons selected for service on the unified trial court should be required to have ten years of experience, consisting of membership in the state bar, service as a state judge, or a combination. Research indicates that all of the present trial court judges will satisfy the ten year requirement by the contemplated operative date of SCA 3 (July 1, 1995).

The Commission adopted the staff's recommendation. A transitional provision should be added to exempt sitting judges, to cover the eventuality that a person lacking the requisite experience is elected before the operative date of SCA 3.

The Commission asked the staff to research whether it is preferable to refer to “appointment or election” of a judge, rather than “selection” of the judge.

### **Residency Requirements**

The Commission considered whether the Constitution should allow the Legislature to prescribe residency requirements for judges of the unified court. On the one hand, such requirements would help give the unified courts a local connection and character. On the other hand, requiring judges to reside locally may hamper selection of qualified judges. The Commission considered the latter argument more persuasive, and concluded that the Constitution should not authorize residency requirements for judges of the unified trial courts. This would continue the existing law regarding superior court judges.

#### STUDY J-1080—TRIAL COURT UNIFICATION: ELECTION OF JUDGES

The Commission considered Memorandum 93-62, relating to election of judges (Cal. Const. Art. VI, § 16).

### **Compliance with Federal Law**

The staff made the following recommendation regarding how to comply with federal law in providing for election of judges to the unified trial court:

- (1) As a general rule, elections should be countywide.
- (2) The Constitution should provide that elections may be conducted on other than a countywide basis when necessary to comply with federal law.
- (3) By statute, the board of supervisors should be made the entity responsible for determining how to comply with a court order requiring deviation from countywide voting.
- (4) The Attorney General should be immediately required to seek pre-clearance of SCA 3 for the California counties where pre-clearance is required.

The Commission discussed this recommendation and how to insulate SCA 3 from challenges under the Voting Rights Act. The consensus was that this was a very serious and difficult issue.

The Commission explored various ideas, including:

- Using existing municipal and justice court districts for election of some judges on the unified court. This would raise issues regarding differentiation among judges and responsibility to an electorate consisting of less than the entire county.

- Using existing supervisorial districts. This would be difficult where the number of judges differs from the number of supervisors.
- Converting judicial elections into retention elections. This would not necessarily insulate the elections from application of the Voting Rights Act. Additionally, it would raise serious political issues that might interfere with voter approval of SCA 3.

The Commission also queried whether the doctrine of one-person, one-vote applies to judicial elections. Professor Kelso thought it did not, but would research the issue.

Professor Kelso questioned whether the board of supervisors is the proper entity to remedy violations of the Voting Rights Act. Aside from this point (on which it has no clear position), the Judicial Council agrees with the staff recommendation, although it regards inclusion of a savings clause as unnecessary, given the existence of the Supremacy Clause.

Following discussion, the Commission tentatively approved the staff's recommendation, subject to further research on the impact of the Voting Rights Act. The Commission agreed it is important to obtain additional input and revisit this decision.

### **Election Following Appointment**

The Commission discussed whether SCA 3 should protect appointees to the unified court from having to stand election shortly after being appointed. The Commission decided not to add such a provision to SCA 3, reasoning that a contrary determination could unduly complicate the political battles over the proposed constitutional amendment.

### **STUDY J-1100—TRIAL COURT UNIFICATION: COMPENSATION OF JUDGES**

The Commission considered Memorandum 93-64, relating to compensation of judges (Cal. Const. Art. VI, § 1100). The staff's recommendation regarding compensation of judges is that all judges of the unified court should receive the same salary, *i.e.*, the salary now earned by superior court judges. The Executive Secretary explained that although this is not a constitutional issue, addressing it now is important because it is a significant political issue.

The Commission agreed with the staff on this matter. The Commission considered but rejected the possibility of phasing in the higher salary for sitting

municipal and justice court judges. The Commission reasoned that such a phase-in would entail inequities and would accomplish little politically.

STUDY J-1130—TRIAL COURT UNIFICATION: TRIAL BY JURY

The Commission considered Memorandum 93-67, relating to jury trial (Cal. Const. Art. I, § 16).

**Eight Person Juries**

The Commission discussed whether the Constitution should give the Legislature authority to provide for eight person juries in civil cases. The staff's recommendation is to include such a provision.

The Commission considered whether the Legislature should be given such authority with respect to all civil cases, or only in some cases (e.g., only in cases involving a minimum monetary amount, or only in cases appealable to the appellate division of the unified court). The Commission deemed some kind of limitation appropriate, but could not decide on the nature of the limit. Thus, for purposes of the draft tentative recommendation, the Commission asked the staff to incorporate the staff's recommendation on this point.

- APPROVED AS SUBMITTED
- APPROVED AS CORRECTED  
(for corrections, see Minutes of next meeting)

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Date

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Chairperson

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Executive Secretary

**ROTHSCHILD & WISHEK**

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October 27, 1993

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739RE: *SCA 3 (Trial Court Unification)*

Dear Members of the California Law Revision Commission:

We are writing on behalf of the Sub-Committee on SCA 3 appointed by the Board of Governors of California Attorneys for Criminal Justice. Founded in 1973, CACJ is an association of almost 2,700 attorneys all of whom defend persons and litigate constitutional issues within the California criminal courts. Each of us is a past president of the organization.

We recognize that the Commission has not been authorized to report concerning the political wisdom or desirability of trial court unification and therefore will not address that issue. We do recognize that an overriding function of the Law Revision Commission is to report on constitutional ramifications of the specific proposal before it -- in this case SCA 3. It is to that narrow perspective that we address our concerns.

**CONCLUSION:**

~~SCA 3 violates the basic tenent that proposed initiatives~~ must clearly state all revisions of the law which will result from their adoption. The out-flowing of position papers from the Judicial Council and others, coupled with the numerous memoranda prepared to date by staff of the Commission confirm that, to the untrained eye, the monumental changes to the California court system which will result from SCA 3 do not appear on its face.

If adopted, SCA 3 will require fundamental, sweeping changes in the method of appointing judges, qualification of judges, distribution of power between the legislative and judicial branches of government and implementation of due process guarantees for those accused of crimes. As to the latter, we have serious concerns that, on its face, SCA 3 de facto repeals due process guarantees of the United States Constitution and parallel provisions of the California Constitution.

Problems inherent in the resulting effects of SCA 3 should be resolved and corrective provisions inserted within the initiative prior to its presentation to the voters. To defer the resolution of such profound failings in SCA 3 to the possibility of remedial legislation at a later date begs the issue and itself may irresponsibly result in legislative chaos. That tactic may also render SCA 3 open to Constitutional challenge on its face.

SUPPORTING CONSIDERATIONS:

(1) By failing to address the issue, SCA 3 dismantles all procedures for due process that depend upon a multi-level trial court, checks and balances between the legislative and judiciary, review of intermediate level court determinations not presently before the courts of appeal, and election of judges consistent with the Federal Voting Rights Act. Having dismantled these long standing concepts and procedures, SCA 3 substitutes nothing for them and makes no attempt at reconstruction. In simplest terms, SCA 3 levels the courthouse and then erects a new outer shell absent any consideration for structural earthquake safety, plumbing, electrical wiring or building codes -- the latter by analogy being the Constitution.

(2) Both in theory and practice it is unwise -- and probably unlawful -- to approve a constitutional amendment whose constitutionality depends upon legislation which is not yet formulated. Should key aspects of the necessary remedial legislation fail to be adopted, the remaining void will surely be filled with volumes of state and federal litigation. Any purported cost savings will quickly vanish.

(3) Independent of constitutional considerations, sound public policy suggests that SCA 3 puts the cart before the horse. Creation of statutes that will fill the void left by adoption of SCA 3 should precede its placement upon the ballot and be incorporated into its provisions. Only in that manner will the voters truly know what they are being asked to accomplish.

A FEW EXAMPLES:

(1) Since it is an initiative, SCA 3 invites the electorate to repeal all distinctions between justice, municipal and superior courts. However, to the extent that adoption of SCA 3 creates voids within the court system, they will be filled by the legislature or Judicial Council. One example is appellate jurisdiction -- what kind of case will be appealed to the District Court of Appeal as opposed to mere reconsideration by an

appellate department of the proposed district court? The Judicial Council recommends that determination be shifted from the legislature to them. That raises fundamental questions about separation of power between the judicial and legislative branch which must be corrected before SCA 3 is placed upon the ballot. What is now a constitutional guarantee should not be relegated to mere "rule making" by the Judicial Council which is easily affected by political considerations.

(2) Some believe that the status quo should somehow be preserved for one year based upon the assumption that implementing legislation will be adopted during the interim. What if the implementing legislation is successfully challenged due to constitutional infirmity? Betting upon a future horse race where the animals are not yet born is a poor risk. Particularly when the court system that brings order to our chaotic society may suffer.

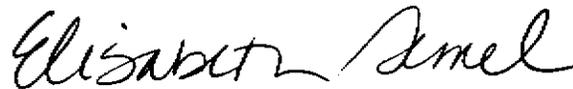
(3) Many procedures implementing due process concepts assume existence of inferior (Municipal) and reviewing (Superior) courts. These include preliminary examinations and motions pursuant to Penal Code §995 and §1538.5 and related writ proceedings. By eliminating the distinction between those courts, SCA 3 destroys the framework within which the due process guarantees operate. That does not appear to voters from the face of SCA 3. These are fundamental protections for all citizens that should not be left to the assumption of future "clean up" legislation. As a corollary it must be remembered that such proceedings cause necessary interaction between the parties and a testing of evidentiary strengths and weaknesses that result in discussion and frequently resolution of the case at an early juncture. Absent such opportunities to dispose of cases, the result will be increased volumes of cases remaining in the "pipeline" for longer periods of time. That will further impact overburdened courts. Provision for reenactment of the presently existing due process procedures otherwise obliterated by SCA 3 should be included prior to placement upon the ballot.

The foregoing comments are not intended as an exhaustive analysis of all problems presented by SCA 3. We do feel, however, that significant concerns exist that should be specifically addressed by the Commission. It is our opinion that to somehow "freeze" the status quo while remedial legislation may be adopted is a dangerous experiment. Problems arising from SCA 3 should be addressed forthrightly prior to its being placed before the voters and solutions to those problems incorporated into SCA 3 before it is voted upon.

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In our view, it is imperative that the Commission use the weight of its authority to counsel the legislature against placement of SCA 3 on the ballot before fully addressing and resolving these important issues.

Very truly yours,



ELISABETH SEMEL (San Diego)  
President, CACJ 1989-90



MICHAEL ROTHSCHILD (Sacramento)  
President, CACJ 1990-91

MR:bjc